

## THE LEGAL PROFESSION'S MONOPOLY: FAILING TO PROTECT CONSUMERS

*Laurel A. Rigertas\**

There is a point at which an institution attempting to provide protection to a public that seems clearly, over a long period, not to want it, and perhaps not to need it—there is a point when that institution must wonder whether it is providing protection or imposing its will. It must wonder whether it is helping or hurting the public.<sup>1</sup>

### INTRODUCTION

The regulation of the legal profession is failing in its consumer protection role because the manner in which the quality of legal services is currently regulated causes insurmountable problems with access to legal services. Current regulations restrict activities that constitute the practice of law to licensed attorneys. This restriction is justified, in large part, based on the assumption that the public cannot make informed decisions about who is qualified to provide legal advice and, therefore, the government must make that determination.<sup>2</sup> Even if this assumption is correct, restricting the practice of law to those who have completed a juris doctor has constrained the market options so that many consumers have no access to legal services at all.<sup>3</sup> This also has consumer protection implications.

The practical effect is that a large number of consumers—who are presumed incapable of assessing the quality of legal services when making purchasing decisions—are for all practical purposes presumed capable of becoming educated and informed enough about the law to handle their legal matters pro se.<sup>4</sup> These two presumptions are irreconcilable. The first presumption justifies limiting the practice of law to licensed attorneys if we,

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\* Associate Professor, Northern Illinois University College of Law, J.D., University of Minnesota Law School. I would like to thank the participants of this Colloquium, *The Legal Profession's Monopoly on the Practice of Law*, 82 *FORDHAM L. REV.* 2563 (2014), for their feedback and comments. I would also like to thank Laurel Terry and Marc Falkoff for their comments on earlier drafts. Lastly, I would like to thank my research assistants Zachary Clark and Alex Van Maren.

1. *In re* Op. No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344, 1360–61 (N.J. 1995).

2. *See infra* Part II.B.1.

3. *See infra* Part III.B.

4. This Article uses the word “consumers” instead of “clients” because many individuals seek the services of a lawyer but are never able to obtain them due to cost constraints, so they never become “clients.” The word “client” presupposes an attorney-client relationship.

as a society, are financially committed to providing everyone with access to a licensed attorney. We are not.<sup>5</sup> Therefore, the regulators of legal services need to address the pragmatic problem raised by the second presumption. Many people who cannot afford a licensed attorney need some help, and many of them could probably pay something reasonable for it, but those options are not available.

Making lawyers' services more affordable and accessible has been a declared goal of the legal profession for decades.<sup>6</sup> The profession's attempts to meet this goal have included efforts to increase funding for legal aid, campaigns to increase pro bono work, and revisions to rules to allow the unbundling of legal services.<sup>7</sup> Recently, the profession has also been examining the rising cost of legal education and student debt as they relate to the cost of legal services.<sup>8</sup> Despite these efforts, however, study after study has shown an increase in unmet legal needs.<sup>9</sup>

Most innovations in the delivery of legal services are occurring in the marketplace by companies trying to reach a segment of consumers that the legal profession has not been able to serve successfully at an affordable cost.<sup>10</sup> There is now a long history of companies trying to fill this void starting with Nolo Press in the 1960s and evolving into the technologically savvy LegalZoom.<sup>11</sup> Such innovations are largely happening in spite of the regulations on the practice of law. Those regulations are still steeped in rules that restrict the exploration of many innovations.<sup>12</sup>

Regulations—particularly those that prohibit some consumer options—should balance the management of consumer risks with the impact on innovation and access. Both have consumer protection implications. The current balance has tipped too far in the direction of managing risks to the point of stifling innovation. It is time for the main regulators of the legal profession—the state supreme courts—to revisit the scope of the legal profession's exclusive monopoly. As a practical matter, this means

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5. See, e.g., LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2009), available at <http://www.lsc.gov/justicegap.pdf>.

6. See Deborah L. Rhode, *The Delivery of Legal Services by Non-lawyers*, 4 GEO. J. LEGAL ETHICS 209, 215 (1990).

7. *Id.*; see also AM. BAR ASS'N, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE 11 (1996) (recommending an expansion of unbundled legal services to increase access to legal services).

8. See, e.g., Judith Welch Wegner, *Response: More Complicated Than We Think*, 59 J. LEGAL EDUC. 623, 639–40 (2010).

9. LEGAL SERVS. CORP., *supra* note 5, at 13–18.

10. See, e.g., Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y.U. J.L. & BUS. 1, 4 (2012); see also John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, 82 FORDHAM L. REV. 2995, 3000–01 (2014) (discussing innovations in the delivery of services to corporate clients).

11. Jon M. Garon, *Legal Education in Disruption: The Headwinds and Tailwinds of Technology*, 45 CONN. L. REV. 1165, 1174–77 (2013) (describing the historical background and rise of self-help legal services such as Nolo Press, LegalZoom, and FindLaw).

12. See, e.g., Renee Newman Knake, *Democratizing Legal Education*, 45 CONN. L. REV. 1281, 1286 (2013).

assessing deregulation of some legal services as well as assessing alternative ways to deliver regulated services. Because of unmet demand, much of this is happening irrespective of the rules governing the practice of law.<sup>13</sup> But if the state supreme courts want to remain relevant to the regulation of the practice of law, they need to take more of a leadership role in these areas.

### I. WHAT JUSTIFIES GOVERNMENT REGULATION?

When the government decides to regulate in any area, two questions should be addressed: why does the government need to regulate this area and how should the government regulate this area? This Part briefly explores some theories of when regulation is appropriate, particularly when the chosen regulatory method is to ban certain options from the marketplace. This Part then examines several reasons to regulate the legal profession and ban nonlawyers from providing legal services.

#### A. Consumer Protection and the Public Interest—Generally

Government regulations can have a variety of justifications,<sup>14</sup> but a key justification for the legal profession's monopoly is to protect consumers.<sup>15</sup> This is not the only justification, but it is one of the more frequently cited ones.<sup>16</sup> Thus, it is worth taking a moment to ask what "consumer protection" usually means. One definition states, "The consumer protection laws are intended to ensure that consumers can select effectively from among those options with their critical faculties unimpaired by such violations as deception or the withholding of material information."<sup>17</sup>

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13. See generally Benjamin H. Barton, *The Lawyer's Monopoly—What Goes and What Stays*, 82 *FORDHAM L. REV.* 3067 (2014) (discussing changes that are taking place in the market for legal services despite few changes to the regulations on the practice of law).

14. Laurel S. Terry et al., *Adopting Regulatory Objectives for the Legal Profession*, 80 *FORDHAM L. REV.* 2685, 2688–92 (2012) (surveying different regulatory theories).

15. Robert B. Reich, *Toward a New Consumer Protection*, 128 *U. PA. L. REV.* 1, 17 (1979) ("Occupational restrictions, in the form of state licensing laws and so-called 'ethical' restraints imposed by professional associations, have traditionally been justified on the assumption that they protect consumers.").

16. See *Countrywide Home Loans, Inc. v. Ky. Bar Ass'n*, 113 S.W.3d 105, 121 (Ky. 2003) ("The rationale for [unauthorized practice of law] restrictions is that 'limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.'" (quoting *KY. SUP. CT. R. 3.130(5.5) cmt. 2*)); *Dressel v. Ameribank*, 664 N.W.2d 151, 155 (Mich. 2003) ("At the core of this movement and of all other attempts to regulate the practice was an interest in protecting the public from the danger of unskilled persons practicing law."); *Mont. Supreme Court Comm'n on the Unauthorized Practice of Law v. O'Neil*, 147 P.3d 200, 213 (Mont. 2006) ("[T]he primary reason for prohibiting the unauthorized practice of law is to protect the public from being advised and represented by unqualified persons not subject to professional regulation."). For a more expansive list of possible regulatory objectives, see Terry et al., *supra* note 14, at 2734 (proposing a list of regulatory objectives for the legal profession).

17. Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 *LOY. CONSUMER L. REV.* 44, 44–45 (1998).

Stated another way, “effective consumer choice requires two things: options in the marketplace and the ability to select freely among them.”<sup>18</sup>

The law has long supported the idea that consumers generally have the ability to purchase all sorts of products and services that may or may not suit their needs and may or may not deliver the desired results.<sup>19</sup> Just think of all the advertisements claiming that exercise DVDs will produce six-pack abs in just weeks, creams will make wrinkles fade, vitamin supplements will make joint pain disappear, drinks will make energy soar, insurance you need will be at the price you name, Botox will make eyes more youthful, acupuncture will increase fertility, and so on. In the end, maybe they will, maybe they will not. But in our free market—in the absence of conduct such as fraud—consumers can usually make these purchasing decisions and then live with the consequences. In the private ordering of affairs, parties can also allocate risks, and individuals may implicitly or expressly assume the risk of adverse outcomes, even when the adverse outcome is as catastrophic as paralysis or death.<sup>20</sup> Such allocations are generally enforced unless they violate public policy.<sup>21</sup>

Consumer protection laws focus predominately on making sure that consumers have accurate and complete information about products and services so that they can make informed decisions when deciding what to buy or whom to hire.<sup>22</sup> Such laws and regulations include those that prohibit false or misleading advertising<sup>23</sup> and those that require additional information, such as disclaimers, warnings, or adequate instructions.<sup>24</sup> Licenses and certifications can also provide consumers with additional information when they make purchasing decisions.<sup>25</sup> Consumers can be protected by preventative measures, such as requiring certain labeling on drugs at the time of marketing,<sup>26</sup> as well as remedial measures, such as

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18. *Id.* at 46.

19. *Wellington Power Corp. v. CNA Sur. Corp.*, 614 S.E.2d 680, 685–86 (W. Va. 2005) (describing the principle of freedom to contract and its public policy limits).

20. *See, e.g., Boyle v. Revici*, 961 F.2d 1060, 1062–63 (2d Cir. 1992) (remanding for a new trial because the jury was not instructed to consider whether the decedent expressly assumed the risk of nonconventional cancer treatment that failed to cure her cancer); *Crace v. Kent State Univ.*, 924 N.E.2d 906, 909–12 (Ohio Ct. App. 2009) (finding that the doctrine of primary assumption of risk barred a paralyzed cheerleader’s claim against the university).

21. *See, e.g., Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 446–47 (Cal. 1963) (holding on public policy grounds that a release of a hospital’s liability for negligence was not valid).

22. *See Purity Supreme, Inc. v. Attorney Gen.*, 407 N.E.2d 297, 306–07 (Mass. 1980) (“The overall purpose of [the consumer protection law] is that of ‘providing proper disclosure of information and a more equitable balance in the relationship of consumers to persons conducting business activities.’” (quoting *Lowell Gas Co. v. Attorney Gen.*, 385 N.E.2d 240, 249 (Mass. 1979))).

23. *See, e.g., CAL. BUS. & PROF. CODE* § 17500 (West 2008); *FLA. STAT. ANN.* § 817.41 (West 2006).

24. *See, e.g., CONN. GEN. STAT. ANN.* § 52-572q (West 2013); *WIS. STAT. ANN.* § 94.676 (West 2012).

25. *See Reich, supra* note 15, at 34–35.

26. *See, e.g., MD. CODE ANN., HEALTH OCC.* § 12-505 (LexisNexis 2009).

consumer protection statutes that provide a private right of action when a consumer is injured.<sup>27</sup>

While consumer protection laws usually strive to help consumers have access to good information or to provide remedies when they are harmed, there are some laws and regulations that remove consumer choices from the market. When the government steps in to determine the options available to consumers, “it replaces the decisions of consumers in the marketplace with government edicts, a method whose premise is fundamentally incompatible with the liberal assumption that each person is the best judge of his or her own needs.”<sup>28</sup> Thus, there should be strong justifications for prohibiting consumer options.

Because the legal profession’s monopoly prohibits almost all consumer options for legal advice and representation other than licensed attorneys,<sup>29</sup> it is useful to examine theories that justify a total ban of some consumer options, as opposed to warnings, disclaimers, or other informational requirements.<sup>30</sup> One theory is that bans “are thought to be necessary whenever the risk and magnitude of physical or economic harm thereby avoided is deemed substantially greater than . . . benefits foregone.”<sup>31</sup> But what justifies the government’s risk-benefit analysis to determine on behalf of consumers what options should be removed from the marketplace? When do we let consumers determine their own level of risk aversion or risk taking and when should the government make those determinations?

One possible answer to this question is that a ban is justified when there are significant costs to the public that arise in the absence of a ban.<sup>32</sup> The ban of leaded gasoline would be one example.<sup>33</sup> No one can buy leaded gas today for use in on-road vehicles.<sup>34</sup> The use of leaded gasoline put thousands of tons of lead into the air that caused lead poisoning, particularly in children.<sup>35</sup> Another way to think about bans in this category is that they require collective action to advance both individual and societal interests; i.e., no individual could choose to remove lead from the air they breathe

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27. See, e.g., 815 ILL. COMP. STAT. ANN. 505/10a (West 2008).

28. Reich, *supra* note 15, at 14.

29. There are a few exceptions to this general rule. See *infra* note 86.

30. See, e.g., Averitt & Lande, *supra* note 17, at 45–46.

31. Reich, *supra* note 15, at 11–12. “The likelihood of consumer harm . . . may be so great relative to the benefits that . . . a total ban is justified.” *Id.* at 32.

32. See, e.g., Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 577–84 (1996) (discussing the need for regulation in the face of externalities causing environmental harm); Thomas A. Lambert, *The Case Against Smoking Bans*, REGULATION, Winter 2006–2007, at 34–40, available at <http://object.cato.org/sites/cato.org/files/serials/files/regulation/2006/12/v29n4-4.pdf>.

33. 42 U.S.C. § 7412 (2006) (regulating forms of air pollutants including lead compounds).

34. Press Release, Env’tl. Prot. Agency, EPA Takes Final Step in Phaseout of Leaded Gasoline (Jan. 29, 1996), available at <http://www2.epa.gov/aboutepa/epa-takes-final-step-phaseout-leaded-gasoline>.

35. *Id.*

without collective action.<sup>36</sup> Government edicts that mandate collective action are the only way to accomplish these goals. There are some who argue that this is the only category where the government should be regulating.<sup>37</sup>

Another possible justification for regulations that ban options is to protect individual consumers from harm. This has been called a “purchasing agent model” where the government is acting paternalistically on behalf of consumers because “consumers cannot be trusted to make rational purchases . . . [so the government needs] to protect consumers from the consequences of their own appetites.”<sup>38</sup> A less paternalistic view is that consumers will misestimate physical or economic risks for a variety of reasons.<sup>39</sup> For example, the Food and Drug Administration is in a better position than is the average consumer to assess the safety and efficacy of drugs before they are sold to individuals. It is not that the government does not trust consumers to make good decisions if all drugs were unregulated; but instead it is not pragmatically feasible that consumers could understand the risks and benefits enough to make an informed purchasing decision.

It is difficult, however, to come up with an example of a prohibition that operates solely to protect individuals and does not have *any* broader societal impact.<sup>40</sup> In reality, most bans probably serve a hybrid purpose; whether they are justified depends on how one views their primary purpose. Laws that prohibit the sale of cars without seatbelts, laws that ban trans fats, and legal attempts to restrict the size of sodas are all examples that fall somewhere along the spectrum of this hybrid category.<sup>41</sup> On the one hand, decisions about what risks are acceptable to one’s body and finances are personal decisions and there is a robust political debate about whether

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36. See Lindsay F. Wiley et al., *Who’s Your Nanny? Choice, Paternalism and Public Health in the Age of Personal Responsibility*, 41 J.L. MED. & ETHICS (SUPPLEMENT) 88, 88 (2013) (quoting Dr. Thomas Farley, Health Commissioner for New York City, who stated: “The reason we have government in the first place is to solve problems collectively that we can’t solve individually”).

37. See Lambert, *supra* note 32, at 34–40; see also JOHN STUART MILL, ON LIBERTY 18 (David Bromwich & George Kateb eds., 2003) (1859) (“The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”).

38. Reich, *supra* note 15, at 19–20. When the government decides who can offer certain services, it has effectively taken on the role of purchasing agent, “assessing the merits and demerits of particular products on behalf of consumers.” *Id.* at 9.

39. *Id.* at 20. “The point is that it is the ignorance of consumers, rather than the product’s intrinsic risk, which triggers the inquiry into the need for government action.” *Id.* at 25.

40. Many would disagree with this point. Some would say that bans on items such as trans fats are paternalistic decrees that deprive individuals of choice. While there is room to debate about when government should intervene, to say that health problems caused by poor diet have no broader societal costs is simply not correct. See *infra* notes 44–45 and accompanying text. *But see* Lambert, *supra* note 32, at 34–40.

41. CAL. HEALTH & SAFETY CODE § 114377 (West 2012) (banning the use of trans fats in food preparation); COLO. REV. STAT. § 22-32-136.3 (2013) (prohibiting food containing trans fats from being made available to students by public schools); N.J. STAT. ANN. § 39:3-76.2 (West 2012) (prohibiting the sale of automobiles not equipped with seat belts).

government regulation is appropriate in these areas.<sup>42</sup> On the other hand, injuries from accidents and health problems related to poor diet can have significant indirect public costs in the form of increased healthcare expenditures and impacts on the labor market.<sup>43</sup> Unlike the example of leaded gas, where the risk of breathing polluted air cannot be averted without collective action, an individual can choose whether to risk the injuries that could result from not wearing a seatbelt regardless of the laws in place. An individual cannot, however, choose what the medical costs will be as a result of those injuries or the impact on the ability to be in the workforce, so to argue that the consequences of such a personal decision has no societal impact, albeit indirect, is mistaken.<sup>44</sup> The debate about the appropriateness of the law, therefore, frequently revolves around an assessment of whether the regulations have a sufficient nexus to the public interest.<sup>45</sup>

### B. Historical Justifications for the Legal Profession's Monopoly

There are several possible objectives for regulating the legal profession,<sup>46</sup> but regulating the delivery of legal services does not necessarily mean that only lawyers can deliver legal services. Different types of practitioners could be regulated too.<sup>47</sup> This section, therefore, focuses on the justifications that are most commonly cited as the basis for limiting the practice of law to lawyers. First, the legal profession's monopoly theoretically protects individuals from the personal consequences of incompetent legal advice that could include losses to life, liberty, and property.<sup>48</sup> The monopoly also serves a broader public interest in the integrity of the rule of law and the effective functioning of the judicial branch of government.<sup>49</sup> Our adversarial system of dispute resolution is usually more effective with trained practitioners, which is why, for example, there is a right to counsel in criminal cases. In this sense, the

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42. See, e.g., *In re Caulk*, 480 A.2d 93, 97–100 (N.H. 1984) (Douglas, J., dissenting) (discussing individual liberty over personal decisions against the state's interest in preserving life).

43. See, e.g., Merav W. Efrat & Rafael Efrat, *Tax Policy and the Obesity Epidemic*, 25 J.L. & HEALTH 233, 239–44 (2012).

44. *But see* Wiley et al., *supra* note 36, at 89 (suggesting that increased healthcare costs are as much a function of our collective financing of healthcare as it is a function of increased obesity).

45. See, e.g., *id.* at 90 (detailing the debate about the “nanny state” versus “personal responsibility” in the context of legal attempts to restrict the size of soft drinks).

46. Terry et al., *supra* note 14, at 2734 (proposing a list of regulatory objectives for the legal profession).

47. See John Flood, *Will There Be Fallout from Clementi? The Repercussions for the Legal Profession After the Legal Services Act 2007*, 2012 MICH. ST. L. REV. 537, 537–38 (describing the liberalized delivery of legal services under the United Kingdom's 2007 Legal Services Act).

48. I say “theoretically” because this assumes that everyone has access to a lawyer and a substantial portion of the population does not have access.

49. See, e.g., Terry et al., *supra* note 14, at 2734 (proposing a list of regulatory objectives for the legal profession).

regulation of the legal profession is unique when compared to the regulation of other professions—no other profession is integral to a branch of government.<sup>50</sup> The monopoly protects the financial interests of lawyers by limiting competition. This section briefly examines each of the theoretical justifications for the legal profession's monopoly.

### 1. Protecting Consumers

One key justification for the legal profession's monopoly is to protect consumers from the adverse consequences to their personal and financial interests that could result from bad legal advice.<sup>51</sup> Simply protecting consumers from such losses, however, is not necessarily a sufficient justification. The law routinely allows consumers to assume the risk of all sorts of physical and economic losses, many of which are catastrophic.<sup>52</sup> Why can a consumer assume the risk of great physical injury by going on a challenging private ski course, but not assume the risk of hiring an unlicensed paralegal to draft a divorce petition? The difference is the assumption that a consumer can become sufficiently educated to make an informed choice about the former, but not about the latter. This is not purely paternalistic in the sense that government does not trust consumers, but instead comes from a belief that consumers cannot be given enough information to adequately assess the quality of professional services and make an informed assessment of risk.<sup>53</sup> Only other professionals can assess whether their peers are qualified to provide the services.<sup>54</sup> By requiring education, an exam, and licensing, the regulatory system ensures some minimum level of qualifications for those authorized to practice law.<sup>55</sup>

In other words, the monopoly exists primarily to correct what has been called "internal market failures," which are defined as limitations inside the mind of the consumer that impede the consumer's ability to make a reasoned selection among a variety of options.<sup>56</sup> The state regulatory system, by insuring a minimal level of competency through licensing,

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50. See MODEL RULES OF PROF'L CONDUCT pmbl. para. 10 (2013).

51. See *supra* note 16 and accompanying text.

52. See *supra* note 20 and accompanying text.

53. See, e.g., Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 955–56 (2000). Economists refer to goods as "credence goods," when it is an expert who determines the buyer's needs. *Id.* at 968–69. This same rationale applies to other regulated professions, such as physicians. See Timothy Stoltzfus Jost, *Oversight of the Quality of Medical Care: Regulation, Management, or the Market?*, 37 ARIZ. L. REV. 825, 827 (1995) (stating that physician licensing is justified because consumers cannot assess the quality of physicians so they must rely on licenses issued by competent authorities).

54. See, e.g., Hadfield, *supra* note 53, at 983 ("In all these [U.S.] jurisdictions, the bar examination is set and graded by the bar.").

55. Whether the standards are sufficient to protect consumers may be open to debate. Many legal employers have lamented that law school graduates are not "practice ready," and that they require substantial on-the-job training to become proficient enough to provide competent legal representation. See, e.g., *id.* at 985 ("A law degree, by itself, leaves a lawyer poorly equipped to do very much in the real world of client representation.").

56. Averitt & Lande, *supra* note 17, at 49.



operates to protect the consumer from the consequences of making bad choices in the market.<sup>57</sup>

Whether consumers are truly incapable of making assessments about the quality of professional services in all situations is worth reexamining. The internet has provided consumers with increasing access to information about the law and to information about the quality of services provided.<sup>58</sup> Furthermore, an increasing number of consumers have been making the choice to use services, such as LegalZoom, to meet some of their legal needs instead of hiring a lawyer. There is little evidence of significant consumer harm arising from these choices.<sup>59</sup>

## 2. Advancing the Integrity of the Judicial System and the Rule of Law

A key rationale for the legal profession's monopoly is not only to protect individuals, but also to advance a broader societal goal of maintaining the public's confidence in the rule of law and the judicial branch of government.<sup>60</sup> Having unqualified legal practitioners in the courts, for example, could have a deleterious impact on the functioning of the judicial system. In the late 1800s, an early advocate for the institution of uniform statewide bar examinations argued: "Unfit and unworthy men have been admitted. The time of the courts has been uselessly consumed. Progress has been impeded. Litigation has increased and justice has been delayed."<sup>61</sup> Another lawyer in the 1920s stated the following regarding the need to curb the unauthorized practice of law:

The layman, a natural person or corporate, may only compete with the lawyer in the practice of the law and the doing of law business by orally soliciting or advertising to do it more expeditiously, faithfully, intelligently, and at less expense than the lawyer, thereby imputing to the lawyer slothfulness, infidelity, and extortion. *A loss of confidence in the courts and lawyers is a sign of governmental decline, and a forerunner of disintegration and anarchy.*<sup>62</sup>

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57. See David Adam Friedman, *Debiasing Advertising: Balancing Risk, Hope, and Social Welfare*, 19 J.L. & POL'Y 539, 549 (2010) ("Most . . . traditional regulatory attempts to change behavior aim to 'insulate' people from making injurious choices by restricting the choices available for them to make.").

58. See Knake, *supra* note 12, at 1291–96.

59. See Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2605–06 (2014).

60. See MODEL RULES OF PROF'L CONDUCT pmbl. para. 10 (2013) ("The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement.").

61. HERMAN KOGAN, THE FIRST CENTURY: THE CHICAGO BAR ASSOCIATION 85 (1974).

62. SPECIAL COMM. OF THE CONFERENCE OF BAR ASS'N DELEGATES, ON WHAT CONSTITUTES PRACTICE OF THE LAW AND WHAT CONSTITUTES UNLAWFUL AND IMPROPER PRACTICE OF THE LAW BY LAYMEN OR LAY AGENCIES (1919), reprinted in 44 N.Y. STATE BAR ASS'N, PROCEEDINGS OF THE FORTY-FOURTH ANNUAL MEETING HELD AT NEW YORK, JANUARY 21–22, 1921 AND CHARTER, CONSTITUTION, BY-LAWS, LISTS OF MEMBERS, OFFICERS, COMMITTEES AND REPORTS FOR 1920 app. A at 302–03 (1921) (emphasis added).

Having competently trained legal practitioners in the courts, therefore, is important to a society whose identity is based largely on the rule of law and the integrity of its judicial system.<sup>63</sup>

This rationale is certainly a noble one, but it is undercut by a couple of realities on the ground. First, the public's perception of the rule of law and equal justice is harmed when much of the public lacks meaningful access to legal representation in the courts.<sup>64</sup> The public tends to view lawyers as hired guns for the wealthy as opposed to affordable advocates for the average citizen.<sup>65</sup> This perception is harmful to the integrity of the courts and the judicial branch.

Second, lawyers perform different types of work in many different settings: advocacy work in the trial and appellate courts, advocacy work in other types of tribunals such as arbitrations and administrative proceedings, transactional work, and consulting on regulatory compliance, to name some examples. Not all of these settings implicate the integrity of the judicial branch to the same degree, so the strength of this justification is not necessarily the same across the spectrum of legal services.

### 3. Economic Protectionism

Another possible rationale for the monopoly that needs to be addressed is economic protectionism. Under this rationale, the state has effectively given lawyers a franchise and, therefore, lawyers have a property interest in their law licenses.<sup>66</sup> Prohibiting competition from unlicensed practitioners protects that property interest in part by keeping lawyers' fees high.<sup>67</sup> This rationale is not commonly articulated in support of maintaining the monopoly because self-protectionism is not a particularly noble endeavor and does not curry favor with the public, but it is an ever-present

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63. See *supra* note 60.

64. See LEGAL SERVS. CORP., *supra* note 5, at 26 ("To the extent that litigants are proceeding without counsel because they cannot afford an attorney, and the outcome of their case is being compromised by lack of representation, equal justice is at risk."). The disparity of resources between prosecutors and public defenders also does little to advance the public's sense of fairness and equality in the justice system. See, e.g., Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 271 (2009).

65. See Russell Pearce, *The Legal Profession As a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 FORDHAM L. REV. 1339, 1358–62 (2006) (discussing the shift to the hired gun paradigm); Richard Lavoie, *Subverting the Rule of Law: The Judiciary's Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115, 185 (2004) (discussing the public's perception that the average citizens view tax lawyers as hired guns who help the wealthy find loopholes).

66. See *Richard F. Mallen & Assocs., Ltd. v. Myinjuryclaim.com Corp.*, 769 N.E.2d 74, 76 (Ill. App. Ct. 2002) (holding that a personal injury law firm had standing to sue a business allegedly engaged in the unauthorized practice of law "[b]ecause the practice of law by an entity not licensed constitutes an infringement upon the rights of those who are properly licensed").

67. See Sherwin Rosen, *The Market for Lawyers*, 35 J.L. & ECON. 215, 216 (1992) (tracing the principle that "[h]igh wages in a profession are necessary to compensate an entrant when great expenses must be incurred from learning its trade" back to Adam Smith).

undercurrent—perhaps even more so today with large numbers of lawyers unemployed.<sup>68</sup>

The legal profession has faced accusations of economic protectionism since it focused on curbing the unauthorized practice of law following the Great Depression, but it has always denied this motive. For example, a 1931 American Bar Association (ABA) committee wrote: “The practice of law by unauthorized persons is an evil because it endangers the personal and property rights of the public and interferes with the proper administration of justice. It is not an evil because it takes away business from lawyers.”<sup>69</sup> The same theme still comes up today. The Washington Supreme Court recently adopted a rule to create limited license legal technicians (LLTs) to focus on providing legal assistance in the area of family law.<sup>70</sup> The Washington State Bar Association’s Board of Governors objected to the proposed rule and argued, among other points, that “the legal technician program will take work away from young, rural, and less affluent lawyers.”<sup>71</sup> The Washington Supreme Court rejected this as a reason not to adopt the proposed rule and wrote:

[T]he basis of any regulatory scheme, including our exercise of the exclusive authority to determine who can practice law in this state and under what circumstances, must start and end with the public interest; and any regulatory scheme must be designed to ensure that those who provide legal and law related services have the education, knowledge, skills and abilities to do so. *Protecting the monopoly status of attorneys in any practice area is not a legitimate objective.*<sup>72</sup>

Following the conclusion of the Washington Supreme Court and others,<sup>73</sup> this Article assumes that economic protectionism is not a proper justification for the monopoly.

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68. See Reich, *supra* note 15, at 5 (“The murky origins of consumer protection are thus intimately bound up with protection of certain businesses from competition.”).

69. *Report of the Special Committee on Unauthorized Practice of the Law*, 56 ANN. REP. A.B.A. 477 (1931); see also Rhode, *supra* note 6, at 220.

70. Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. SUPRA 75 (2013).

71. *Id.* at 106.

72. *In re Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians*, No. 25700-A-1005, slip op. at 7 (Wash. June 15, 2012), available at <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf> (emphasis added).

73. See, e.g., *State v. Pledger*, 127 S.E.2d 337, 339 (N.C. 1962) (stating that unauthorized practice of law statutes were “not enacted for the purpose of conferring upon the legal profession an absolute monopoly in the preparation of legal documents; its purpose is for the better security of the people against incompetency and dishonesty in an area of activity affecting general welfare”).

## II. THE MONOPOLY'S RESTRICTIONS ON MARKET OPTIONS AND THE RELATED IMPACT ON CONSUMER PROTECTION

Having looked at some of the benefits of giving lawyers a monopoly over certain work, this Part examines some of the costs. If the legal profession were not a government-regulated monopoly, it would be subject to the full force of state and federal consumer protection and antitrust laws.<sup>74</sup> Instead, the profession has been largely policing itself with respect to traditional consumer protection issues—i.e., protecting consumers from deceptive practices, unfair billing, and the like.<sup>75</sup> The profession has not, understandably, concerned itself with issues that would fall in the antitrust area of what can be considered “external market failures”—meaning anticompetitive limits on the menu of options.<sup>76</sup> A monopoly, by its very definition, is obviously limiting the market. But do the concerns about consumers' limited ability to evaluate the quality of professional services justify abandoning concerns about the menu of options available? To answer this question, this Part briefly looks at how the monopoly's effect on the external market—the menu of options—negatively impacts consumers, focusing on the interrelated issues of cost, access, and innovation.

### A. *The Limits on Competition Drive Up Costs*

Any monopoly can drive up prices—this is one of the main rationales for antitrust laws.<sup>77</sup> Scholars previously have argued that the legal profession's monopoly also increases the cost of legal services to consumers. For example, Professor Hadfield wrote: “The concept of a profession may set the practice apart as a normative ideal, but the structuring of the [legal] profession is still the structuring of a market.”<sup>78</sup> She argues that the current structure has resulted in a bidding competition for scarce resources that has been dominated by those with the most money—corporations and wealthy individuals.<sup>79</sup> This, in turn, has driven up the cost of legal services because

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74. This is not to suggest that the profession is completely immune to antitrust laws. It is not. *See, e.g.*, *Goldfarb v. Va. State Bar*, 421 U.S. 773, 793 (1975) (“[C]ertain anticompetitive conduct by lawyers is within the reach of the Sherman Act.”); Rhode, *supra* note 6, at 217–18.

75. *See, e.g.*, *Cripe v. Leiter*, 703 N.E.2d 100, 107 (Ill. 1998) (holding that the Illinois Consumer Fraud Act was not intended to “regulate the conduct of attorneys in representing clients” and, therefore, allegedly fraudulent billing practices were exempt from the Act).

76. *Averitt & Lande, supra* note 17, at 50–51 (describing external market failures).

77. *See, e.g.*, *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (“The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.”).

78. Hadfield, *supra* note 53, at 956.

79. *Id.* Professor Hadfield further explained:

The distribution of legal services produced by the market for lawyers is thus quite disturbing: organized as a self-regulating profession with guardianship of the public justice system, a system that lies at the heart of democratic social structure, the profession is propelled by market forces to devote itself disproportionately to the management of the economic relationships of commerce and not the management of just relations among individuals and the state.

*Id.* at 956–57.

the cost is not based on the services provided; instead, it is based on the value that the wealthiest consumers place on the services.<sup>80</sup>

The monopoly's restriction on the involvement of nonlawyers also shields lawyers from price competition from other players in the market, which can also drive up costs. For example, the Federal Trade Commission (FTC) has frequently cautioned bar associations not to restrict nonlawyers from handling real estate closings because everyone—even consumers who choose to hire a lawyer—pay less when nonlawyers are also allowed to handle real estate closings. The FTC provided some empirical evidence for this position when it wrote to the Ethics Committee of the North Carolina State Bar:

In 1995, after a 16-day evidentiary hearing conducted by a special master, the New Jersey Supreme Court rejected an opinion eliminating lay closings. *The Court found that real estate closing fees were much lower in southern New Jersey, where lay settlements were commonplace, than in the northern part of the state, where lawyers conducted almost all settlements. This was true even for consumers who chose attorney closings.* South Jersey buyers represented by counsel throughout the entire transaction, including closing, paid \$650 on average, while sellers paid \$350. North Jersey buyers represented by counsel paid an average of \$1,000, and sellers paid an average of \$750.<sup>81</sup>

Some argue that a monopoly's high fees are just one side of a social contract that is of mutual benefit to both the profession and consumers. As one author wrote about the history of the growth of occupational licensing statutes:

Although intended to protect from competition certain industries and occupations—interests which were able to mobilize political support for entry restrictions far more easily than consumers could have mobilized against them—the advantages that accrued to consumers from these measures support a theory of mutual benefit. *Consumers in effect accepted higher prices in exchange for security against marginal operators, who might otherwise have taken advantage of rapid changes to defraud or endanger them.*<sup>82</sup>

There may be some truth to this mutual benefit theory. As compared to other restrictions on choice, such as dietary restrictions, the public has not been as hostile to restrictions on choice that derive from professional licensing.<sup>83</sup> This suggests that the public sees some value in licensing. The

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80. *Id.* at 956.

81. Letter from Dep't of Justice and Fed. Trade Comm'n to N.C. State Bar Ethics Comm. (Dec. 14, 2001), available at <http://www.ftc.gov/be/V020006.shtm> (emphasis added); see also Letter from the Staff of the Fed. Trade Comm'n Office of Policy Planning, Bureau of Competition, and Bureau of Econ. to Carl E. Testo, Counsel for the Rules Comm. of the Superior Court of Conn. (May 17, 2007), available at <http://www.ftc.gov/be/V070006.pdf> (expressing concerns that a proposed rule to define the practice of law would be interpreted in an overly broad manner and would have a negative impact on consumers and competition).

82. Reich, *supra* note 15, at 8 (emphasis added).

83. See Wiley et al., *supra* note 36, at 89.

public's discontent with lawyers is, however, mainly focused on cost.<sup>84</sup> Given the high cost of lawyers, this mutual benefit theory has broken down for the vast majority who simply cannot afford to pay the current cost of security against marginal operators.<sup>85</sup>

*B. The Limits on Competition Restrict Access to Legal Services*

With few exceptions, the current scope of the legal profession's monopoly limits consumers' options for legal services to those provided by licensed attorneys.<sup>86</sup> As discussed, this is justified on the basis that the government must regulate options for consumers who cannot assess the risks and benefits of services in an unregulated market. This premise, however, presupposes that every consumer has the resources to hire a lawyer or will otherwise be able to obtain a lawyer. If the consumer does not have such access—and many of them do not—then there really is no choice other than to proceed pro se. Consumer protection is not advanced when there is a group of highly trained lawyers that large segments of the population cannot access.<sup>87</sup> Under this scenario, much of the public is left wandering around the self-help section of bookstores and self-help kiosks in courthouses trying to figure out how to handle matters on their own.<sup>88</sup> If they cannot become informed enough to decide to hire a paralegal versus an attorney, how are they supposed to become informed enough to handle legal matters on their own?

The legal profession has recognized this problem, but it has almost exclusively focused on increasing pro bono and legal aid services as the remedy for this failure in access.<sup>89</sup> In other words, the legal profession has historically focused on increasing access to lawyers, as opposed to exploring innovative alternatives, as the main solution.<sup>90</sup> This approach is

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84. See, e.g., Paul F. Teich, *Are Lawyers Truly Greedy? An Analysis of Relevant Empirical Evidence*, 19 TEX. WESLEYAN L. REV. 837, 847–48 (2013) (summarizing polls regarding the public's perception of lawyers' greed and the cost of legal services).

85. See LEGAL SERVS. CORP., *supra* note 5, at 1–2 (“[T]he vast majority of people who appear without representation do so because they are unable to afford an attorney.”).

86. See Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 J. PROF. LAW. 79, 114–22 (2012) (discussing limited exceptions for form preparation assistance and representation in administrative proceedings).

87. See LEGAL SERVS. CORP., *supra* note 5, at 25 (reporting data collected throughout the states in 2006, which found that a large percentage of litigants are unrepresented).

88. See LEGAL SERVS. CORP., REPORT OF THE PRO BONO TASK FORCE 12 (2012), available at [http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF\\_%20Report\\_FINAL.pdf](http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf) (noting that in 2011, over 65,000 people in Chicago, “all of whom who were already in court and in desperate need of assistance,” used various help desks located within Cook County).

89. *Id.* at 18 (“Pro bono lawyers are a great potential resource for reducing demand for legal services.”); Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 425 (2003) (“During the mid-twentieth century, the bar sought to encourage greater pro bono involvement. Part of the motivation was to prevent the government from responding to pervasive unmet needs by loosening the rules against practice by nonlawyers . . .”).

90. See, e.g., Susan Hayes Stephan, *Blowing the Whistle on Justice As Sport: 100 Years of Playing a Non-zero Sum Game*, 30 HAMLINE L. REV. 587, 613–14 (2007).

not working. Study after study has concluded that every year millions of Americans are handling their legal matters without any legal assistance, and the problem is getting worse.<sup>91</sup>

Despite the growing unmet need for legal assistance, many law school graduates are having trouble finding work, causing many to conclude that there are too many lawyers.<sup>92</sup> There are, however, only too many lawyers if the demand is defined as those who can afford to pay lawyers' going rates. There are not too many lawyers if demand is defined as those who need legal assistance.<sup>93</sup> The monopoly's cost structure has created a great disconnect in the market between supply and demand that is preventing the public from accessing legal services.

### C. *The Limits on Competition Stifle Innovation*

An industry that enjoys a monopoly has little incentive to innovate in ways that could reduce the cost of services.<sup>94</sup> As a self-regulated monopoly, the legal profession has had little incentive to innovate thus far. For almost the past 100 years, the education and licensing of lawyers and the delivery of legal services has looked about the same—lawyers attend three years of law school, they take a bar exam, they receive their license from a state supreme court, and they are the only ones authorized to provide legal services. This is not necessarily surprising. As Professor Christensen has written, disruptive innovations frequently originate outside of incumbent organizations.<sup>95</sup>

What is unique about the legal profession, as compared to other professions, is that it enjoys substantial immunity from outsiders who want to challenge the monopoly's status quo because, under the separation of powers doctrine, the state judicial branches regulate the practice of law.<sup>96</sup> Unlike other professions, such as the medical profession, there is no legislative process for outsiders to lobby and seek changes to the scope of the legal profession's monopoly to allow for innovation.<sup>97</sup> With rare exception, legislatures cannot authorize nonlawyers to engage in acts that are considered the practice of law, so any changes to the scope of the legal profession's monopoly must come from the state supreme courts and their rulemaking processes or from challenges in the marketplace.<sup>98</sup> Both of

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91. See e.g., LEGAL SERVS. CORP., *supra* note 5, at 1–2.

92. See, e.g., Mark Hansen, *Barely Half of All 2012 Law Grads Have Long-Term, Full-Time Legal Jobs, Data Shows*, A.B.A. J. (Mar. 29, 2013), [http://www.abajournal.com/news/article/barely\\_half\\_of\\_all\\_2012\\_law\\_grads\\_have\\_long-term\\_full\\_time\\_legal\\_jobs\\_data/](http://www.abajournal.com/news/article/barely_half_of_all_2012_law_grads_have_long-term_full_time_legal_jobs_data/).

93. LEGAL SERVS. CORP., *supra* note 5, at 1 (“[O]nly a small fraction of the legal problems experienced by low-income people (less than one in five) are addressed with the assistance of either a private attorney (pro bono or paid) or a legal aid lawyer.”).

94. See Averitt & Lande, *supra* note 17, at 46–47.

95. CLAYTON M. CHRISTENSEN, *THE INNOVATOR'S DILEMMA: THE REVOLUTIONARY BOOK THAT WILL CHANGE THE WAY YOU DO BUSINESS* (First Harper Bus. Paperback ed. 2011); see also Campbell, *supra* note 10, at 7–12.

96. See Rigertas, *supra* note 86, at 111.

97. See *id.* at 111–13.

98. See *id.* at 111–26.

these are occurring, but most changes are occurring by challenges in the marketplace.<sup>99</sup> Challenges from the marketplace, however, can be risky business propositions in the absence of clear authorization from the state supreme courts. If a new business model is challenging the status quo, it may face a lawsuit charging the unauthorized practice of law. The survival of the business—and value of the investment in it—could then turn on the outcome of that lawsuit. Challenges from the marketplace also put the state supreme courts in the position of leading from behind instead of being in the forefront of thinking about ways to increase access.

### III. REASSESSING THE LEGAL PROFESSION'S MONOPOLY

The future sustainability of the legal profession's monopoly will require state supreme courts to be more proactive in assessing ways to increase access and to reexamine the boundaries of lawyers' exclusive practice areas. As an initial matter, it may be helpful for them to set out an explicit analytical framework to assess the type of services that lawyers provide in light of the types of justifications for limiting consumer options. It may be helpful as an initial matter to conceptualize the framework as a table to examine areas where alternative approaches may be viable. Here is a simplistic start that could be further developed:

		Types of legal work			
		Representation of clients in the courts	Representation of clients in other advocacy proceedings, e.g., administrative proceedings	Representing clients in transactional work; corporate transactions, wills, contracts, etc.	Providing legal advice and counsel, e.g., OSHA compliance, regulatory compliance, etc.
Justifications for the monopoly	Protecting the public from unqualified practitioners				
	Protecting the integrity and functioning of the judicial branch				

This Article argues that the justifications for the monopoly are the strongest in the first column and then, as a whole, get progressively weaker as indicated by the color shading.<sup>100</sup> Therefore, the strength of the justifications for limiting legal service providers to only licensed attorneys does not have the same force across the entire spectrum of work that lawyers do. And, in fact, what is pragmatically happening across the country in terms of nonlawyer activity also supports this conclusion.<sup>101</sup> The

99. See *supra* note 11 and accompanying text.

100. These rationales for government regulation can be expanded into a more nuanced list, but this Article is focusing on these two key areas. For a more detailed list of possible regulatory objectives, see Terry et al., *supra* note 14, at 2734–42.

101. See, e.g., Dzienkowski, *supra* note 10, at 3001; Barton, *supra* note 13, at 3084–85.



remainder of this Part briefly looks at the two ends of the spectrum on this table to explore how this framework can help inform future regulations.

Based on this preliminary table, the strictest limits on who can practice law have the strongest justifications when the work involves the courts, as reflected in the first column. In that column, there are valid consumer protection concerns and valid concerns about the integrity and functioning of the judicial branch, so there is a strong case to be made for some regulation of legal services. The relative strength of the justification does not necessarily mean that only lawyers should perform those services. Under the current structure, the lack of access to legal assistance by those who can afford such services undermines the consumer protection concerns. Therefore, more state supreme courts should consider alternative types of regulation. Much like the delivery of healthcare services, there are potential benefits in stratifying the legal profession to train and regulate professionals with different types of legal training.<sup>102</sup>

Three states—Washington, California, and New York—are all currently examining the role that nonlawyers can play in the delivery of legal services. This suggests some growing recognition that a licensed attorney may not be needed for every legal issue.<sup>103</sup> In June 2012, the Washington Supreme Court enacted the most expansive model to date—a Limited Practice Rule for LLLTs.<sup>104</sup> The rule creates a framework for the licensing and regulation of nonlawyers, who will be authorized to independently perform discrete tasks that clearly are the practice of law.<sup>105</sup> The Washington Supreme Court explained that the rule was necessary because the legal profession's efforts to close the access to justice gap have not successfully stopped the growth of low- and moderate-income citizens who have no access to affordable legal assistance.<sup>106</sup> In March 2013, the Washington Supreme Court approved family law as the first practice area.<sup>107</sup> One of the benefits of this approach is that the LLLTs owe

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102. See Rigertas, *supra* note 86, at 118–22.

103. Consistent with this idea, several states and federal agencies have authorized nonlawyers to appear in a representative capacity in administrative proceedings. See, e.g., 5 U.S.C. § 555(b) (2012) (permitting federal agencies to determine whether nonlawyers may appear in administrative proceedings in a representative capacity); 820 ILL. COMP. STAT. 405/806 (2014) (authorizing nonlawyers to represent claimants before the Illinois Department of Employment Security); 26 C.F.R. § 601.502 (2014) (permitting certain nonlawyers to represent taxpayers before the Internal Revenue Service); 49 C.F.R. §§ 511.71–.73 (2013) (permitting nonlawyers to represent parties before the National Highway Traffic Safety Administration).

104. WASH. ADMISSION TO PRACTICE R. 28. For an in-depth analysis of this rule and the history of its enactment, see generally Holland, *supra* note 70.

105. *In re Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians*, No. 25700-1-1005, slip op. at 2 (Wash. June 15, 2012), available at <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf>.

106. *Id.* at 4–6.

107. *Limited License Legal Technician (LLLT)*, WASH. ST. B. ASS'N, <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians/> (last visited Apr. 26, 2014).

professional duties to their clients similar to those of an attorney, which includes important protections such as the attorney-client privilege.<sup>108</sup>

California and New York are in earlier stages of exploring the role of nonlawyers. In March 2013, the State Bar of California's Board of Trustees created a Limited License Working Group to explore the creation of a limited practice license.<sup>109</sup> The working group has had several public meetings and has recommended further study of a limited license program as a way to increase access to legal services.<sup>110</sup> In New York, Chief Judge Jonathan Lippman formed the Committee on Non-Lawyers and the Justice Gap in early 2013 to study the use of nonlawyers to provide some assistance in simple legal matters. That committee was expected to make recommendations for a pilot program to focus in the areas of housing, elder law, and consumer credit before the end of 2013.<sup>111</sup> All of this suggests a growing recognition that more options can be made available to consumers without creating intolerable risk. It is possible, however, that none of these options go far enough. The tasks authorized so far are really quite constrained and they may just be the first step necessary to develop expanded options. State supreme courts should robustly explore these options.

Returning to the table, as one moves to the fourth column, consumer protection concerns still exist, but the concern about the integrity and functioning of the judicial branch decreases. Therefore, the state supreme courts should consider alternative regulations, or perhaps even deregulation of some services in these areas. Deregulation of some legal services would reduce the costs of services through increased options and competition, but it would increase the risk to consumers of incompetent services. Consumers would have little assurance of the quality of services they were purchasing other than those assurances provided by the marketplace. Instead of protecting consumers at the point of purchase, consumer protection would largely depend on postinjury remedies that would likely arise from lawsuits for breach of contract, consumer fraud, or deceptive trade practices.<sup>112</sup> These remedies could be insufficient because questionable operators may not have adequate assets to pay judgments.<sup>113</sup> Furthermore, consumers would not have any of the protections that arise from professional duties, such as the duty of confidentiality and the duty of

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108. WASH. ADMISSION TO PRACTICE R. 28(k).

109. For links to the Working Group's agendas and news, see *Limited License Working Group*, ST. B. CAL., <http://www.calbar.ca.gov/AboutUs/BoardofTrustees/LimitedLicenseWorkingGroup.aspx> (last visited Apr. 26, 2014).

110. Laura Ernde, *Panel Gives Nod to Limited License Idea*, CAL. B.J. (July 2013), <http://www.calbarjournal.com/July2013/TopHeadlines/TH5.aspx>.

111. Joel Stashenko, *Non-lawyers May Be Given Role in Closing 'Justice Gap,'* N.Y. L.J., May 29, 2013, at 1.

112. Instead of complete deregulation, there could be limited regulation that mandated certain disclaimers and information to help consumers assess the risk of the services being purchased.

113. Publicly funded victim compensation funds could provide an alternative source of recovery if the profession was deregulated.

loyalty. These concerns support a conclusion that deregulation is not as attractive an option as a broad remedy for increasing options. In effect, this approach would completely swing the pendulum so that the consumers would have little protection from internal market failures in order to remedy external market failures. However, deregulation may be appropriate in some limited areas.

There are a growing number of examples of consumers exercising the limited choices available to them with little evidence of consumer harm.<sup>114</sup> Some of these areas are unregulated. As mentioned, many consumers have paid money for do-it-yourself assistance from companies like Nolo Press and LegalZoom.<sup>115</sup> Many companies hire consulting firms that may or may not have lawyers on staff to provide advice about a wide range of regulatory compliance.<sup>116</sup> The state supreme courts should consider amending the formal rules that are, in many respects, inconsistent with what is actually occurring in the market. Furthermore, other countries, such as the United Kingdom, are experimenting with alternative structures to deliver legal services, which are providing additional data that some alternative models can exist without undue harm to consumers.<sup>117</sup> This area warrants further exploration.

#### CONCLUSION

At the heart of the suggestions for deregulation and stratification are a couple of assumptions. First, there is an assumption that reducing the costs of entry to the profession and increasing competition will make legal services of an adequate quality more affordable to a broader segment of the population. Second, there is an assumption that without a three-year juris doctor, a person could still be trained to competently handle some legal matters. Both of these assumptions warrant more study, but it is likely that getting reliable data on these assumptions will not be possible until more states experiment and implement alternatives that can be assessed. When the Washington Supreme Court created LLLTs, it responded to criticism that the economics of the proposal were unknown:

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114. See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 3–4 (1981). Only 39 percent of jurisdictions surveyed reported any direct customer complaints, and out of the 1,188 inquiries, investigations, and complaints reported by bar agencies, only 2 percent were a form of customer complaint about a specific customer injury. *Id.* at 33; see also Thomas D. Zilavy & Andrew J. Chevez, *The Unauthorized Practice of Law: Court Tells Profession, Show Us the Harm*, 78 WIS. LAW. 8 (2005), available at <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=78&Issue=10&ArticleID=994> (discussing the Wisconsin Supreme Court's denial of the state bar's petition to provide a clear definition of the unauthorized practice of law because the bar did not provide any evidence that that a problem exists).

115. See Garon, *supra* note 11, at 1174–77.

116. See Lowell J. Noteboom, *Professions in Convergence: Taking the Next Step*, 84 MINN. L. REV. 1359, 1364–74 (2000).

117. See generally Flood, *supra* note 47.

No one has a crystal ball. It may be that stand-alone limited license legal technicians will not find the practice lucrative and that the cost of establishing and maintaining a practice under this rule will require them to charge rates close to those of attorneys. On the other hand, it may be that economies can be achieved that will allow these very limited services to be offered at a market rate substantially below those of attorneys. There is simply no way to know the answer to this question without trying it.<sup>118</sup>

It is also worth noting that deregulation and stratification will not fill the entire gap. There is still a segment of the population that cannot afford to pay anything for legal services. For that group, legal aid and pro bono will continue to be vital. However, legal aid and pro bono are never going to be able to close the entire gap.<sup>119</sup> For those who can pay something for legal services, but not the going rates, more options need to be available.

There are several issues in legal education that make exploring the training of different types of professionals particularly timely. First, there has been a consistent decline in law school applications over the past several years that has left most law schools with excess capacity.<sup>120</sup> There have been predictions that some schools will close.<sup>121</sup> Given the number of unmet legal needs, however, this would be an unfortunate outcome. Second, there has been a call from the legal profession for law schools to produce graduates who are “practice ready.”<sup>122</sup> Third, there has been discussion and concern about the rising cost of legal education.<sup>123</sup> Many who address the issue of cost suggest reducing the number of credits to obtain a law degree.<sup>124</sup>

If the state supreme courts are willing to reexamine who can practice law, it may also be a good opportunity to examine how legal education should be retooled. What if schools could offer the traditional three-year juris doctor program that would allow someone to practice in all areas, as is the case today, but also offer several specialty degrees that would only require twelve or eighteen months of study and lead to a limited license in that practice area? For example, could a law school—working with the existing curriculum—craft a two- or three-semester curriculum in an area such as housing law that would prepare a graduate to fully represent clients in landlord-tenant disputes, evictions, foreclosures, and real estate closings? Could states go beyond what Washington State has done, which does not allow the LLLTs to appear in court, and let law schools create a two- or

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118. *In re* Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-1-1005, slip op. at 8–9 (Wash. June 15, 2012), available at <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf>.

119. Rigertas, *supra* note 86, at 90–94.

120. Ethan Bronner, *Law Schools' Applications Fall As Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 30, 2013, at A1.

121. *Id.*

122. David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, at A1.

123. David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, at BU1.

124. Daniel B. Rodriguez & Samuel Estreicher, *Make Law Schools Earn a Third Year*, N.Y. TIMES, Jan. 17, 2013, at A27.

three-semester curriculum that would lead to a limited license in family law that would allow a practitioner to fully represent clients in divorce and custody proceedings? If these subject-specific licenses included a semester of field practice or apprenticeship prior to being licensed, would these practitioners be closer to being practice ready? In a world of increasingly specialized practice, does everyone who is authorized to practice law need a general legal education? If the external market—the menu of options available—is an important aspect of consumer protection, then the state supreme courts should explore all of these questions.